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No. 87-135

In The
Supreme Court of the United States
October Term, 1987

PATTI AND PAUL ENSIGN,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FOURTH DISTRICT

PETITIONERS' REPLY IN RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO THE RESPONDENT'S QUESTIONS PRESENTED FOR REVIEW

1. This Court should grant review in this case because Petitioners properly advanced the federal constitutional issues in the courts below.

2. This Court should grant review because Petitioners' rights to due process and equal protection were violated when the termination of their parental rights was ultimately based upon their status as persons with mental handicaps, rather than their conduct as parents.

3. This Court should grant review in this case because the issue of a less intrusive alternative to termination of parental rights was properly raised at trial, in the Appellate Court of Illinois and in the Petition to the Illinois Supreme Court.

4. Petitioners' rights to due process and equal protection were violated when they were found to be unfit parents and their parental rights were terminated with no evidence on the record to support such a finding.

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Prior to addressing the specific points raised by Respondent in its Brief in Opposition, Petitioners wish to clarify that, while they are mentally handicapped, they neither are, nor are they considered to be, mentally ill. Respondent does discuss Petitioners in terms of mental illness and Petitioners believe it is very important that this Court understand that they are actually highly functioning persons with mental retardation.

I.

Respondent raised four (4) questions for this Court's consideration in determining whether to grant review in this case. First, Respondent alleges that Petitioners failed to advance their constitutional issues in the courts below, thus this Court should decline review for jurisdictional reasons. However, Petitioners did raise each and every constitutional issue at trial and at the Appellate and Illinois Supreme Court levels of review. The State of Illinois has had four (4) meaningful opportunities to consider and decide the constitutional claims in this case. In fact, the Appellate Court of Illinois did address some of them in its opinion. (Appendix to Petition For Writ Of Certiorari at 16c) Petitioners have included in the Appendix to this Reply the Motion For New Hearing that was granted by the trial court and which outlines every constitutional claim raised to this Court, Petitioners' Request for Rehearing to the Appellate Court of Illinois that discusses the constitutional issues in detail, and finally, the Petition For Leave to Appeal that Petitioners filed in the Supreme Court of Illinois, that also discusses in detail the constitutional issues raised here.

The Appendix to the Reply should amply demonstrate to both this Court and Respondent that the constitutional questions at issue here have been properly "raised, briefed and argued" (Respondent's Brief in Opposition at 4) at each and every state court level, including trial, Appellate and the Illinois Supreme Court. While Petitioners were not granted the opportunity to *argue* these issues to the Illinois Appellate and Supreme Courts, they were both raised and briefed at those levels. Since Petitioners did properly raise these federal constitutional issues in the courts below, this Court should grant review of the questions as they are properly within its jurisdiction.

II.

Respondent next argues that it was Petitioners' conduct that led to the termination of their parental rights, rather than their status as persons with mental handicaps. However, Respondent quotes the Illinois Appellate Court's discussion of Petitioners' mental handicap in support of its contention, rather than any discussion of *conduct* on the part of Petitioners. As Petitioners have repeatedly argued, an examination of their "conduct and relationship with the child" (Respondent's Brief In Opposition, at 7) would have led to the retention of their parental rights, rather than termination. A close scrutiny of the evidence adduced at trial reveals that with appropriate and available services, Petitioners are capable of raising their child.

III.

Respondent's third argument is that this Court should deny review of the claim that Petitioners were denied due process and equal protection when the state terminated their parental rights without considering whether the state's interest could be protected by other, less intrusive alternatives. Respondents allege that Petitioners failed to advance this claim below. Petitioners are pleased that Respondent agrees that no consideration was given to less drastic alternatives. The presence of this issue properly raised and briefed in the documents in the Appendix places this issue squarely before this Court, in light of Respondent's agreement that the State acted improperly in failing to consider less intrusive alternatives, thereby violating Petitioners' constitutional rights.

IV.

Respondent supports the opinion of the Illinois Appellate Court in arguing that there was evidence to support the trial court's finding of unfitness. However, Respondent fails to address Petitioners' arguments that the findings it cites at page 12 of its Brief in Opposition, not only were unsupported by clear and convincing evidence, but are perplexing considering the evidence on the record that the child was loved, happy, healthy, thriving and developing normally. (R. 159, 105, 213)

Petitioners are aware that this Court will not normally review findings of fact made by a lower court. Petitioners are also aware that this Court will review such findings when no evidence supports the lower court's conclusion. The facts on the record Petitioners' abilities and performance and the excellent condition of the child, demonstrate that no evidence of unfitness was ever adduced by the State.

CONCLUSION

This Court should grant review in this case because jurisdiction was properly invoked under 28 U.S.C. § 1257(3), and Petitioners' rights to due process and equal protection under the law were violated by the actions of the State of Illinois.

Respectfully submitted:

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Appendix A

IN THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT, ILLINOIS
MOULTRIE COUNTY, JUVENILE DIVISION

In the Interest of PAUL ENSIGN, JR.,
A Minor.

No. 85-L-24

MOTION FOR NEW HEARING

Now come the parents of the minor, PAUL ENSIGN, JR, PATTY ENSIGN, and PAUL ENSIGN, Sr., and move this court to grant a new hearing and in support thereof allege as follows;

1. That both an Order of Adjudiction and a Dispositional Order were entered herein on January 14, 1986.

2. That no Dispositional Hearing was held in said cause.

3. That significant factors could be presented to the court concerning the welfare of the child at a dispositional hearing.

4. That the state failed to carry the burden of proof required by law in order to terminate parental rights.

5. That the state is required to prove the parents unfit by clear and convincing evidence and that level of proof was not attained at the one hearing held in this cause.

6. That the court, in announcing its decision indicated that the State had proven that the child was abused and neglected by a preponderance of the evidence and that fault was proved by clear and convincing evidence.

7. That the court applied the wrong standards to the instant case and made no specific findings of record that either parent was an unfit parent.

8. That in the absence of a specific finding of unfit-

ness of either parent the child should be restored to the parents pending a dispositional hearing.

9. That the state was permitted to introduce evidence at the hearing concerning the disposition of the cause in the form of testimony from David Cole that adoption was a strong possibility for the minor.

10. That this was designed to be a bifurcated hearing and the parents did not anticipate that the dispositional hearing would be conducted simultaneously with the adjudicatory hearing. This resulted in the state getting in testimony about the adoption but the parents not presenting information about the disposition of the cause which resulted in a hearing which deprived the parents of the opportunity to apprise the court of their evidence concerning the proper disposition of the cause.

11. That the acceptance of said testimony undly (sic) prejudiced the court toward adoption without the other parties being given the opportunity to present testimony concerning the disposition of the cause.

12. That the Adoption Act, Ill. Rev. Stat., 1983, Ch. 40, par. 1501D(p) is unconstitutional as it was applied in this case. The proceedings in this particular cause violated the Due Process clause and the Equal Protection Clause of the United States Constitution and violated Article I, Sec. 2 of the Constitution of the State of Illinois in the following manner:

A. There is an insufficient amount of guidance provided concerning what would constitute a reasonable time period for the parents to be incapable of discharging parental responsibilities. In the instant case, the testimony showed that the parents had made great strides in their parenting skills and were continuing to make progress. The statute does not take permit a court to take into consideration the progress that the parents are making toward good parenting skills. For these reasons the statute itself is unconstitutionally vague.

B. In the instant case, the court did not make a specific finding of unfitness, nor did the court state that a finding was made that the parents were unable to discharge parental responsibilities at the time of the hearing. Nor did the court make a specific finding that there was sufficient justification to believe that the inability to discharge parental responsibilities would continue beyond a reasonable time period. In spite of the lack of specific findings to that effect, the court terminated parental rights to the child placed the child in the custody and guardianship of the Department of Children and Family Services and granted authority to the Department to consent to the adoption of the child. The parents contend that such action clearly violates the Due Process rights of the parents since the right to raise one's own child is a constitutionally protected right.

C. That if findings were made that the parents were unfit such findings would be against the manifest weight of the evidence in this cause.

D. That the granting of adoption rights in the instant cause was wholly uncalled for under the facts and circumstances of the case. All of the testimony showed that the parents loved the child and cared for the child and did the best that they could to help the child. The state has shown no compelling state interest concerning the necessity of the adoption of the child. For the Court to order that the child was to be taken from his parents and placed for adoption if an adoptive home was available denies the parents of their constitutional right to form family relationships and no showing was made that that was necessary under the facts of this case. Even if the child were to be maintained in a foster home there is no reason to break the established parent child relationship.

E. Since there was no dispositional hearing the court did not consider other placement options.

F. Since there were findings of abuse and neglect

and further findings of fault, as indicated by the record an impermissible category has been created by the court which discriminates against these parents simply because of the mental retardation. The categories created are parents who abuse and neglect their children who are not retarded and those parents who abuse and neglect their children who are retarded. In cases of parents who are not retarded they are given an opportunity to resolve the problems which led to the abuse and neglect through working with counselors and/or the Department of Children and Family Services. As applied in the instant case, the Court appears to have made findings of abuse and neglect and to have terminated parental rights because the parents were retarded without specifically stating that findings were made that the parents were unfit because of their retardation. There is no showing from the statements made by the court on the reocrd (sic) that the court considered the proper factors in terminating the parental rights of these parents.

13. That because of the errors at the said hearing the parents of the minor child should be given a new hearing.

WHEREFORE, the parents of the minor child request that the court vacate the earlier proceedings, hold individual hearings concerning the fitness of the parents, and adjudicatory hearing, and, if necessary, a dispositional hearing, and that the court will order the child to be returned to the parents under the supervision of the Department of Children and Family Services until this case can be resolved.

PATTY ENSIGN,
PAUL ENSIGN, Sr.

/s/ SHARON A. BUCKLER
SHARON A. BUCKLER

/s/ OLIVER ELDER
OLIVER ELDER

The undersigned certifies that a copy of the foregoing was hand delivered to the office of the Moultrie County State's Attorney and mailed to the other Attorneys of Record on the 11th day of February, 1986.

/s/ SHARON A. BUCKLER
SHARON A. BUCKLER

Appendix B

4-86-0261

In The

Appellate Court of Illinois

Fourth District

IN THE INTEREST OF:
PAUL ENSIGN, JR.

THE PEOPLE OF THE STATE OF ILLINOIS,
Petitoner-Appellee,

vs.

PAUL ENSIGN, SR. AND PATTI ENSIGN,
Respondent-Appellant.

Appeal from the Circuit Court of the Sixth Judicial Circuit, Moultrie County, Illinois

Trial Court No. 85-L-24

Honorable
W.B. Kranz
Judge Presiding

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I. INTRODUCTION

Petitioner Appellants respectfully request rehearing pursuant to S. Ct. Rule 367, and further state that this Court has overlooked errors of law and fact made by the trial court; that this court has misapprehended points of law and fact and has overlooked the question of constitutional law contained herein..

Appellant further petitions this Court to provide guidance as to the application and interpretation of an Illinois statute, namely, Ill. Rev. Stat. 1985, ch. 40, par. 1501 D (p), so as to give effect to Appellants' federal constitutional rights, since this is a case of first impression.

The specific question at law is whether the state has a compelling state reason to justify termination of parental rights, absent any past or present evidence of abuse or neglect, pursuant to subsection (p), and in the instant case, whether termination of Appellants' parental rights was the least restrictive means to advance legitimate and compelling state interest.

II. ERROR OF FACT

> The decision of the Court was not sustained by the evidence, and is against the weight of the evidence.

This court determined that the trial court's finding of unfitness pursuant to section 1D (b), (d), (g), (i), (o) Ill. Rev. Stat. 1985, ch. 40, par. 1501 D (b), (d), (g), (i), (o) are all interrelated and based upon the same facts in evidence. Appellants agree, but further aver that the facts in evidence are insufficient to sustain a finding of unfitness that the vast weight of the evidence clearly establishes that the parents neither neglected the minor child, nor were they incapable of learning ways to improve their parenting skills. (A. Op. 18)

This Court's finding that Respondent failed to provide proper care for the minor cited four (4) particular areas: (A. Op.13)

1) Respondents were unable to properly feed the child.

Joy Colclasure, a townswoman testified in response to the question of food in the house, that, "... there really wasn't much there." (R. 15) She further stated that she brought the Respondents "ready mix formula," and asked Respondents to keep the bottles so that the amount of formula consumed by the child could be assessed. Respondents did not, she testified, comply with her wishes. (R. 15) However, she later testifies on cross examination and contradicts this testimony about the bottles, and testifies that the baby "obviously had had something to eat," (R. 21) and that the used bottles were in evidence, in the refrigerator, the sink, or thrown away. (R. 22.) She further testifies on cross examination that she had not been involved with infant feeding theories and answered affirmatively that based on her delivery of formula, and the empty bottles found, that there was no question that the child was eating and being fed. (R. 25-26)

Joanna Cole, the county health nurse testified that Respondents picked up the WIC vouchers every month, which entitled them to get food for the infant and that they came by themselves. (R. 35) She further testifies that the baby was gaining weight and was growing. (R. 40)

Suzanne Wainscott, a degreed R.N., who was the home interventionist for the birth to three program, (R. 94-95) testified that she was always told by Respondents that the child had two bottles, but that she knew it was either more or less than two. (R. 99) How she "knew" this is not explained. When questioned directly about proper weight gain, she stated that just by looking at him, it was observable that he gained weight. (R. 112)

State's witness, Ronald Matthew, Ph.D., licensed as a Clinical Psychologist, testified that Respondents were capable of feeding the child. (R. 131)

Virginia Dauz, M.D., a pediatrician, who had seen and

examined the child 4 times between the ages of 2½ months and 9 months, (R. 154-157) testified that the baby was gaining weight within the normal range, that he was clean and dressed appropriately. (R. 159)

It is interesting to note that Joanna Cole testified that while she had not determined exactly how much formula was fed to the baby, she grudgingly admitted that the weight gain showed he had been eating and he was developing physically. Her further statement that "... the formula was gone somehow," is another example of the unwillingness to recognize the accomplishments of the Respondents in caring for their child. (R. 44) Further, Nurse Cole testifies that she has no experience with mentally retarded persons other than casual, that her contact was not sustained, with Respondents, (R. 47) and she did not know what progress Respondents had made with the DCFS housekeeper. (R. 48)

This betrays the prejudicial tone of the state's witnesses that nothing positive with respect to the parent/child relationship was the result of the respondents' efforts or learning, but was instead, something that could be characterized as dumb luck..

Suzanne Wainscott offered that the child was eating solid foods (R 105) and that the Respondents' learned to buy baby food by looking at the labels on the jars. (R. 106-107)

While all parties involved with counting empty bottles complained that the bottles were not kept by Respondents, not one person testified that the child was not fed, nor did even one witness testify that the infant failed to thrive or that he looked unhealthy. Although the Court concludes that the Respondents were not able to properly feed the child, 5 witnesses, all but one for the state provided clear evidence Respondents were able to feed and did feed the child properly.

2) Respondents were unable to properly regulate the temperature in their apartment. (APE. 13)

Appellant is unable to ascertain the significance of the purported 'too hot" temperature of Respondents' apartment. Two inferences in the record exist as to the temperature. Joy Colclasure testified that the heat was, "much, much, much too high!" When questioned as to the actual temperature, she imagined it had to be, "85 or so, really, really, really warm." (R. 18) The second reference is made by Suzanne Wainscott, who testified that the thermostat was set at approximately 90 degrees and the room temperature was "around eighty." However, she said they opened the windows instead of turning down the the thermostat. (R. 101-102)

The inference drawn by the Court was the inability of the Respondents to learn to regulate the thermostat. An equally valid inference is that they had an infant in the home who needed more warmth then the adults complaining about the temperature, or even that they liked to open the window to get some air and kept the heat up to prevent the apartment from becoming too cold.

Totally absent from the record is any evidence that harm resulted to the child or that 80-85 degree indoor temperatures in the winter were unhealthy or contraindicated for an infant.

3.) Respondents were unable to recognize and appropriately respond to medical emergencies. (A. Op. 13)

The only "medical emergency" that could be construed from the record is the incident of the fall of Paul, Jr. from the infant seat. Although there was not a scintilla of evidence that this accident caused any physical or emotional harm to the child, this incident ballooned into negative presumptions about the parents' ability to care for their child, ultimately leading to the termination of their parental rights.

Nancy Robbins was the only eyewitness to the accident who testified for the state. She stated that Paul Ensign was carrying the infant seat in his arms, he stopped, attempted to get a better purchase on the seat and while balancing it on his knee, the baby slid to the ground from a distance of Respondents' waist to the ground, estimated to be 3 feet. (R. 6) She further testified on cross examination, that the baby landed first on his feet. (R. 10) Paul said something to Patti which was not understood by the witness. (R. 11)

The issue which then was examined by the state's witnesses was, had the baby been taken to the doctor? The county nurse, Joanna Cole, testified that she saw the infant about 2 hours after the accident and "no injury appeared, I didn't find any contusions or bruises at all." To "be on the safe side," she had the Sullivan police transport the child to an unnamed doctor. (R. 30) No doctor was produced at the trial to testify about the examination, and it is admitted that there was no injury.

The child sustained no injury in this accident. How then were Respondents expected to respond in order to appear "appropriate," to this alleged medical emergency. The record is absent of any evidence whatsoever to conclude that the Respondents' response was inappropriate or that any other medical emergency arose which the Respondents failed to cope with in an appropriate way. In the words of Rennie Willoughby, accidents happen to any family. (R. 227)

Indeed, Daile Rozene stated, when questioned about Respondent father's ability to recognize dangerous situations and potential hazards and avoid them, that he, Respondent-father, uses "good common sense in his work." Recognizing that farming is a hazardous occupation, the witness stated that Respondent-father has never been injured on the farm. (R. 168-169) Respondent has worked for this witness for 15 years. (R. 162) The State on cross examination established that Respondent is a good

employee who follows the instructions of his employer. (R. 168-169)

Apparently, Mr. Rozene's judgment of Respondent's "good common sense" was sufficient to entrust his tractor, pickup truck, and his grain harvest to him. It also appears Respondent had possession of a valid driver's license. (R. 163-170)

The weight and sufficiency of the evidence given by Mr. Rozene, who employed the Respondent for 15 years, appears to have been totally ignored by the trial court. Mr. Rozene's characterization of Respondent is not consistent with an inability to recognize and respond to medical emergencies.

It is totally implausible to infer that this Respondent was unable to adjust a thermostat or to know when his son was injured and required medical assistance. In fact, it is explicit in Mr. Rozene's testimony that Respondent himself sets the cylinder mechanically to determine the depth of ground to be cultivated or disced.

Finally, this Court has found that Respondents failed to provide proper care for the minor because:

4) **They were unable to provide adequate emotional and physical stimulation. (A. Op. 13)**

It is unclear to appellants how the Court determined Respondents were unable to provide adequate emotional and physical stimulation. Searching the record, we conclude that Wainscott's inference that the parents were incapable of learning to turn the baby because the back of his head was flat (R. 103-104) may have accounted for the Court's conclusion. However, that conclusion is directly contradicted by the testimony of Dr. Dauz, the child's pediatrician, when she stated that the child "had a flat, what I call brachycephalic head which is kind of a flat head expecially of the back. . ." (R. 155) and could not attribute it specifically to the failure of the parents to turn the baby.

There is testimony that the parents hold the baby, allow freedom of movement and that his growth and development were normal. Additionally, Appellant found in the record, testimony by Dr. Gillespie that she believed that any child stimulation programs would be helpful and specifically mentioned Head Start. She further states that such early intervention programs are effective for children at high risk. (R. 84) At all times Respondents cooperated fully with the early intervention program provided.

This Court found abuse based upon an environment injurious to the child's welfare, namely, he was dropped accidentally; Respondents failed to recognize potentially dangerous conditions in and around the home, i.e., Respondents leaving dangerous items such as medicine within reach of child; and Respondents' "severely limited ability" to recognize and respond to medical emergencies that might arise. (A. Op. 14)

The related finding of the accident, when the child was dropped, and Respondents' limited ability to respond to medical emergencies that might arise, have been discussed previously and need not be reiterated here.

The finding that the parents could not recognize to correct potentially dangerous conditions in and around the home is not supported by the evidence in the record. This finding appears to be based upon medicine bottles being left on the floor, an observation made by state's witness Wainscott. She testifies that she felt the infant to be too confined and instructed Respondents to remove Paul, Jr. from the crib and playpen so he could develop motor skills. (R. 102) They apparently followed the instructions because Nurse Wainscott further testifies that she instructed Respondents to move medicines off the floor so the infant could not reach. them. She observed "one time it was in a childproof container. One time it was not in a childproof container." (R. 100) There is no record that other than these two occasions, it ever occured again. In fact,

Rennie Willoughby, the homemaker assigned to work with the Respondents by DCFS, testified that she instructed the Respondents to move electrical cords off the floor and to cover electrical outlets for the protection of the child. She went out to lunch and returned an hour later, whereupon she observed that all of these instructions had been fully complied with. (R. 220) She futher testifies clearly as to the learning ability of these parents, no debris was littered on the floor, although there was sometime "stuff" on the floor. (R. 220) Respondents learned not to give the child a bottle while he was lying flat on his back, thus avoiding ear infections. (R. 223-224) Respondents watch the child closer, they vacuum the floor more often, they shampoo the carpet. (R. 227) Indeed she testifies that the child is "overly cared for," one or both of the Respondents are with him constantly, always. (R. 217) There is testimony by Respondent, Paul Ensign that, with respect to the hole in the screen door, and the possibility of the child tumbling down 2 flights of stairs that "he (the child) don't go out the door, we lock the door." (R. 246) To infer that this was an inappropriate response to prevent injury to his son is simply absurd. To further infer that he lacked the mental capacity to see or understand the potential risk is totally unsupported in the record.

While Appellant is acutely aware that the trial court will not be overturned unless it is contrary to the manifest weight of the evidence, and the credibility of the witnesses is left with the trier of facts, credibility alone, without facts to support findings is not legally sufficient.

A careful examination of the record raises serious questions about the weight of the testimony given by a Certified Psychologist, Dr. Matthews, who testified that the local mental health center could provide parent training services, that the Respondents were capable of acquring those skills, but that the Respondents never received them, and that supplemental assistance for the child's intellec-

tual development was also locally available. (R. 127-134) This is supported by the testimony of the defense witness, Vicki Baxter, the social worker assigned to the family by DCFS. She testified that her recommendation was that the parents should receive, and would benefit from, the parenting classes at the mental health center, which ranged from individual to group instruction. She observed that they learned how to regulate the temperature of the baby's milk, learned to put important dates on the calendar so they would not forget them, and they called unfailingly to ask for instruction. (R. 198-200)

Further testimony established that the Respondents clearly loved the child, played with him, held him and cared for him. (R. 201) This testimony, together with Dr. Matthews' about the Respondents' potential appears to be completely ignored. It would appear that the only portion of Baxter's testimony regarded as credible was her statement that, the parents "probably" do not provide as much attention and hold the child as "probably" most parents do. (R. 201)

Appellant believes that the Court mistakenly construed the testimony to be evidence that Respondents did not provide enough attention to the child's emotional development. (A. Op. 9)

III. ERROR OF LAW

Since the factual findings of unfitness by the trial court are against the manifest weight of the evidence on record, the finding of unfitness rests solely upon Ill. Rev. Stat., 1985, ch. 40, par. 1501 D, (P). In the instant case, the application of subsection (P) resulted in the establishment of a classification which violates equal protection and the effect of this law as applied creates the classification forbidden by *Helvey* v. *Rednour*, 4 Ill. Dec. 671, 408 N.E. 2d 17 (1980), and as a result a different standard was applied to these mentally retarded appellants. Such classifications requires strict scrutiny of the current statue by this Court.

Meyer v. *Nebraska*, 262 US 390, 43 S. Ct. 625, 67 Led 1042 (1923).

Such a strict scrutiny reveals the same problems discussed in *Helvey* (supra). There, the Appellate Court decided that not only was the right of a retarded parent to raise a family constitutionally protected as a fundamental right, but that a finding of continued mental retardation in the future was insufficient to prove the unfitness of the parent in the present. In the absence of findings of past or present patterns or acts of abuse or neglect, the speculation as to future abilities under subsection (P) does not pass constitutional muster.

This Court cites *In Re Stilley*, (1977) 66 Ill. 2d 515, 363 N.E. 2d 820, an Illinois Supreme Court case, in support of its contention that the best interest and welfare of the child is the essential policy consideration in child neglect cases. However, in *Stilley*, (supra) the evidence showed that the parents were drug and alcohol abusers, and that the child had been left to wander away and was left alone at home by the parents. Future speculation about parental care was sustained by actual past acts of the parents. *In The Interest of Brooks*, 63 Ill App. 3rd 328, 379 N.E. 2d 872 (1978) more fully elucidates the necessity of finding an actual act of abuse by parents, and bars speculation about the future care of the child, unless such act or pattern of acts are firmly in evidence.

In the instant case, the state failed to adduce evidence, of both weight and sufficiency, to establish that the Ensign parents were either neglectful or abusive; thus, speculation as to the minor's physcial (sic) problems, and the inability of the Respondents to cope with them, must be established before the court can speculate as to the future ability of the parents to care for the child, i.e., best interest, and is barred absent such evidence.

The fact that subsection (p) of the instant statute requires a finding of inability to discharge parental respon-

sibility based upon competent evidence of a psychiatrist or clinical psychologist, still fails to distinguish it from the statute considered in *Helvey*. Here, the psychologist was used to classify Respondents through test scores, then to generalize the abilities of Respondents to discharge parental responsibilities without *ever* directily observing those abilities. (R 86). Psychologist Gillespie, upon whom the trial court relies, admitted that direct observation is the best evaluative tool, (R. 91) however, she never does so. The trial court relied upon Dr. Gillespie's speculative predictions about the parents' future ability to discharge parental responsiblity without one iota of evidence of either past or present acts or patterns of abuse or neglect. (R. 34, 39, 43, 112, 113, 158, 159)

It also appeared that the trial court disregarded entirely the evidence on the record from both the state and defense witnesses that the parents have learned in the past and could continue to learn in the future to discharge parental responsibility with the assistance of those services they are required by law to seek out for the child. Ill. Rev. Stat. ch. 37, sec. 701-2 (3) (b), and which the child by law, has a right to receive. The record is silent as to any instance wherein this child's right to such services were denied or resisted by respondents.

On the basis of her in-office tests, Dr. Gillespie testified that respondents are and will continue to be, incapable of discharging their parental responsibilities. (R. 73) However, many witnesses who directly observed Respondents with their child testified as to the parents' ability to discharge their parental responsibilities and to continue to learn to do so in the future.

Joy Colclasure stated that there was no question that the child was eating and being fed. (R.25-26) She also stated that there were toys available, (R.23) and that Respondents are very fond of the baby (R.22) and that he was clothed. (R.27-28)

Joanna Cole stated respondents provided food, (R.35) the baby was gaining weight and growing, (R.40) and that there was no evidence of neglect. (R.43) In addition, she stated that the baby was happy and smiling (R.39) and that Respondent knew how to change the baby. This is an error of fact on the part of the Court. In its recitation of the highlights of this witnesses' testimony, the Court states Ms. Cole testified Respondent did not know how to change the baby (A. Op. 3) when in fact, Ms. Cole testified that the Respondent did know how to change the baby.

Suzanne Wainscott testified that they learned to purchase appropriate baby food through recognition of the jars. (R. 106-107) She also testified that there was no abuse of the child (R. 112), and that the baby was thriving. (R. 113) She also agreed that the Respondents were cooperative with her. (R 114)

Dr. Matthews testified that the Respondents were capable of acquiring parenting skills and that the training was available locally. (R. 127-134)

Vicki Baxter also testified that the parents should receive and would benefit from, parenting classes. (R. 198-200) Such direct observation should hold greater weight with this court than the psychologists' opinion, who did not observe Respondents with the child. Witnesses' direct observations are the very evidence that raises these parents out of the mere classification or status found so abhorent in *Helvey*; Test (sic) scores are no substitute for the individual direct observation of respondents' abilities with their child.

Since this Court's other concerns such as ability to adequately feed, clothe and provide medical care for the child should be alleviated by the great weight of the evidence on the record, we can only conclude that the court based its decision on its finding of inability of the parents to provide adequate emotional and physical stimulation. (A. Op. 13) The court goes on to speculate "that because there is poten-

tial risk that this child will be developmentally delayed and may be retarded in the future, the court has applied a standard contrary to *Brooks* (supra) and *Stilley* (supra). This is especially true in light of neuro pediatrician, Dr. Daniel Pochetti's testimony that, to his surprise, despite the fact that this child suffers from microcephalia, the child is not currently developmentally delayed or retarded at all. His development is within normal limits. (R.189)

The wider implications of this Court's decision are fearsome to contemplate. The Court is, as it stated, basing its decision on the future inability of Respondents to meet what it states are the future emotional and physical stimulation needs of the child. Those stimulation needs were in part defined, on the record, by the testimony of psychologist, Dr. Gillespie, wherein she stated:

"I think the level of *stimulation* in the home as it relates to school or everyday living would be so very minimal since *neither one of them can read* and have difficulty counting or computing. A child does much better to have stimulating toys. I don't think they would be aware of *what toys to purchase* or what the *purpose of some of the toys would be to enrich..Speech is very important.* You know, to learn phonics . . . They do have *speech articulation problems.*" (emphasis added) (R.72)

Does this Court contemplate finding unfit otherwise normal parents who are illiterate, or too poor to purchase enriching toys or who are too undereducated, or the prevocally deaf because they do not speak? Obviously not.

Those elevated standards are not found in any statute or case law. Few Illinois citizens would be found fit to be parents. Such standards are not applied to normal parents and to appy them in this case to mentally retarded parents raises serious questions of equal protection under the law, pursuant to *Helvey* (supra) and *Meyers* (supra).

IV. SUMMARY

The findings of neglect and abuse by the trial court are clearly against the manifest weight of the evidence, lacking in support as to weight and sufficiency, which constitute an abuse of judicial discretion.

In addition, the application of Ill. Rev. Stat. 1985, ch. 40, par. 1501 D (p), placed Appellants in a constitutionally impermissible classification, which resulted in the application of a standard that is not applied to "normal" parents.

If allowed to stand, mentally retarded parents will be subjected to a standard as to their future ability to parent, absent any past or present evidence of pattern of abuse of neglect, which is not applied to other parents.

The effect or result from the application of this standard, results in an abrogation of Appellantts' (sic) fundamental constitutional right to establish a family and raise children, violating their right to equal protection under the law.

The state cannot demonstrate a compelling state interest in determining parental rights, when subjected to the strict scrutiny required of subsection (p), since the interest lies in speculation as to future capabilities, which is fraught with ambiguity and uncertainty.

Despite the explicit state policy of strengthening the minor's family ties, (Ill. Rev. Stat. ch. 37 section 701-2 (1-2), the trial court exercised the most restrictive means to further the perceived future best interest of the child.

If allowed to stand, the effect will result in a chilling effect upon mentally retarded persons to seek out services provided to them and to their children. Such services, it being the policy and law of the state to provide, which, through use, would stigmatize and punish as evidence of their future ability and right to raise their children.

CERTIFICATE OF SERVICE

I, Carol J. Bell, an attorney, hereby certify that on the twentieth day of November, 1986, I served one copy of the foregoing Respondent-Appellant's Brief in Support of Petition for Rehearing, upon Dan Flannel, Attorney at Law, by mailing the same First Class Postage Prepaid to 200 West Harrison Street, P.O. Box 195, Sullivan, Illinois 61951.

/s/ CAROL J. BELL ESQ.

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Attorney for Respondent-Appellant

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(312) 341-0022

CERTIFICATE OF SERVICE

I, Carol J. Bell, an attorney, hereby certify that on the twentieth day of November, 1986, I served one copy of the foregoing Respondent-Appellant Brief's in Support of Petition for Rehearing, upon Paul Lee Stone, State's Attorney, by mailing the same First Class Prepaid Postage to the State's Attorney, Moultrie County Courthouse, Sullivan, Illinois, 61951.

/s/ CAROL J. BELL ESQ.

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CERTIFICATE OF SERVICE

I, Carol J. Bell, an attorney, hereby certify that on the twentieth day of November, 1986, I served three copies of the foregoing Respondent-Appellant's Brief in Support of Petition for Rehearing, upon Robert J. Biderman, Deputy Director, by mailing the same by First Class Postage Prepaid to the State's Attorney Appellate Service Commission, 151 Bruns Lane, Suite 103, Springfield, Illinois 62704.

/s/ CAROL J. BELL ESQ.

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Appendix C

No.

In The
Supreme Court of Illinois

IN THE INTEREST OF:
PAUL ENSIGN, JR.

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Respondant,

vs.

PAUL ENSIGN, SR. AND PATTI ENSIGN,
Defendant-Petitioner.

Petition for Leave to Appeal as a Matter of Right from the Appellate Court of Illinois, Fourth District,

No. 4-86-0265

There Heard on Appeal from the Circuit Court of the Sixth Judicial Circuit, Moultrie Co., Illinois
Honorable
W.B. Kranz
Judge Presiding

NOTICE OF FILING

To: Mr. Robert J. Biderman
Deputy Director
State's Attorney's Appellate
Service Commission
151 Bruns Lane, Suite 103
Springfield, Illinois 62706

PLEASE TAKE NOTICE that I have, this the 6th day of January, 1987, caused to be filed in the Office of the Clerk of the Supreme Court of Illinois, fifteen (15) copies of the Defendant-Petitioner's Petition for Leave to Appeal As a Matter of Right /Petition for Leave to Appeal in the above-captioned and hereby serve you with three copies of the same.

Carol J. Bell, Esq.
Attorney for Defendant-Petitioner

No.

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IN THE INTEREST OF:
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PETITION FOR LEAVE TO APPEAL AS A MATTER OF RIGHT
PETITION FOR LEAVE TO APPEAL

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PAUL ENSIGN, SR. AND PATTI ENSIGN

In The
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IN THE INTEREST OF:
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Honorable
W.B. Kranz
Judge Presiding

PETITION FOR LEAVE TO APPEAL AS A MATTER OF RIGHT PETITION FOR LEAVE TO APPEAL

The defendant-petitioner, Paul Ensign, Sr. and Patti Ensign, respectfully petitions this Court for leave to appeal as a matter of right or alternatively, for leave to appeal from the judgement of the Appellate Court of Illinois, Fourth District.

PETITION FOR APPEAL AS A MATTER OF RIGHT/PETITION FOR LEAVE TO APPEAL

I

Petitioners, Respondent-Appellants, Paul Ensign Sr. and Pattie Ensign, appeal the decision of the Appellate Court as a matter of right, pursuant to S. Ct. Rule 317, raising a question under the Constitution of the United States and of this State, which has arisen in and as a result of the action of the Appellate Court.

In the alternative, Petitioners herein pray that leave to appeal be granted as a matter of sound judicial discretion.

II

The order of the Appellate Court was entered on October 30, 1986; Appellants filed a petition for rehearing on November 20, 1986, which was denied on December 3, 1986. Affidavit of Intent to Seek Review in the Illinois Supreme Court was filed by Appellants on December 8, 1986. A Petition for Certificate of Importance was filed on December 9, 1986 by Appellants, and was denied by the Appellate Court on December 17, 1986.

III

POINTS RELIED UPON FOR REVERSAL

1. There is need for this Court to exercise its supervisory authority and reverse the decision of the Appellate Court because of the effect the Court's decision on the generally important question presented, to wit: the constitutional rights of mentally retarded persons to marry and raise a family.

2. The order of the Appellate Court should be reversed because each and every one of the Appellate Court's findings that the evidence on the record supported the trial court's finding of neglect, abuse, dependency and the unfitness of these Appellants to be parents is against

the manifest weight of the evidence for the following reasons:

a. There is no evidence in the record of failure to thrive.

b. There is no evidence in the record of improper nutrition or clothing.

c. There is no evidence in the record of any lack of necessary medical attention.

d. There is no evidence in the record of any injury.

e. There is no evidence in the record of abandonment.

f. There is no evidence in the record of any lassitude.

g. There is no evidence in the record of any delayed development, either emotional or physical.

h. There is no evidence in the record that the child was dirty.

i. There is no evidence in the record of undernourishment..

j. There is no evidence in the record that the home was improperly heated.

k. There is no evidence in the record that the child ever consumed a dangerous substance.

l. There is no evidence in the record that this child ever experienced a medical emergency either through illness or physical trauma.

m. There is no evidence in the record of any past or present abuse or neglect.

3. This Court should reverse the decision of the Court of Appeals because the Fourth District in the instant case based its decision ultimately on the speculative future ability of Petitioners to be fit parents absent any acts or patterns of acts of abuse or neglect, whereas, in *In Re Interest of Brooks*, the same Fourth District decided that a finding

of unfitness requires actual acts or patterns of abuse or neglect to be firmly in evidence and barred speculation as to the future probability. Such a conflict should be considered and resolved by this Court.

4. This Court should reverse the decision of the Appellate Court because that court's decision is in conflict with *Helvey v. Rednour*, 86 Ill. App. 3d 154, 408 N. E. 2d 17 (1980), wherein the Fifth District decided that a finding of unfitness based solely on the classification of a parent as mentally retarded was unconstitutional under the federal constitution, and barred such finding absent actual evidence of abuse or neglect.

5. This Court should reverse the decision of the Appellate Court because that court made a decision pursuant to *Ill. Rev. Stat.* ch. 40. par. 1501D (p) regarding the Petitioners' future ability to discharge parental responsibilities that supported the trial court's error of failing to meet the clear and convincing evidentiary standard, since each and every finding of the trial court on this issue was against the manifest weight and sufficiency of the evidence.

6. This Court should reverse the decision of the Appellate Court because a serious public question arises when obedience to one law results in punishment by another law. That is, compliance with *Ill. Rev. Stat.* ch. 37, par. 701-2 (3) (b), in obtaining needed services for their child ultimately led to Petitioners being adjudicated unfit parents, in part because of their need for the services.

7. This Court should reverse the sustained dispositional order in this case because both the trial court and the Appellate Court could have exercised a less restrictive and severe alternative to adoption in the disposition of this case; the mere fact that these Petitioners are mentally retarded resulted in the most severe sanction possible under Illinois law.

8. This Court should reverse the decision of the Appellate Court because of the public policy consideration

of the chilling effect on mentally retarded persons who will hesitate to avail themselves of necessary services through fear of being identified as mentally retarded, thereby placing themselves in jeopardy of losing their children because they need services.

9. The Court should reverse the Appellate Court's decision because it violates the policy of the State of Illinois that implicitly recognizes the ability of mentally retarded persons to learn in its laws. *Ill. Rev. Stat.*, ch. 91 1/1, par. 1-111.

STATEMENT OF FACTS

The minor, Paul Ensign, Jr. was born on November 28, 1984 to Patti and Paul Ensign, Sr., a mentally retarded couple. (R. 14, 52)*

On or about December 12, 1984, the minor, Paul Ensign, Jr., accidentally slipped from an infant seat that his father was carrying him in. (R. 9) An individual who witnessed the incident as well as another townsperson became concerned that the baby might have been injured and went to locate the Petitioners. (R. 14) The individuals thereupon contacted the county health nurse who went to the Petitioner's home to examine the baby. (R. 14, 30) The nurse did examine the baby and found no injuries, bruises or contusions. (R. 30) She recommended, however, that the Petitioners have the baby examined by a physician, which they did. (R. 30) The child was found to be uninjured.

On December 18, 1984, the department of Children and Family Services (hereinafter referred to as "DCFS") became involved with the Petitioners, and began providing homemaker services. (R. 196, 210) Initially, a homemaker visited the Petitioners' home five (5) times a week

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* "R" refers to the transcript of the hearings on December 17, 1985 and January 7, 1986. "C" refers to all of the record except the transcript.

for two (2) hours a day. (R. 218) After several months, the homemaker visited the Petitioners' home three (3) times a week for two (2) hours a day. Throughout the period of time in which the Petitioners received homemaker services, the Petitioners cooperated fully with anyone who came into their home to assist with their baby, including concern townspeople, social workers, and the DCFS homemaker. (R. 20, 41, 201, 216) The services continued until December 15, 1985, whereupon the homemaker became ill. Thereafter, the homemaker visited the Petitioner's home twice between December 15, 1985 and January 7, 1986, at which time Paul, Jr. was removed from the home and custody of his parents. (C. 87, R. 218)

The Petitioner, Paul Ensign, Sr., works as a farm laborer, and has worked for the same farmer for fifteen (15) years. (R. 162) He works during the spring, summer and fall, as the weather dictates. (R. 170) The Petitioner, Patti Ensign, is a housewife and remains at home while her husband is working. (R. 213) The minor, Paul Ensign, Jr., is characterized by two physicians as a healthy, normal baby, who despite having microcephalia, is developing normally the first year of his life. (R. 155, 157, 158, 179, 189) The minor's microcephalia was viewed as being genetic as both parents also have abnormally small heads. (R. 177) There is no evidence in the record that the child was ill-cared for, that he exhibited a failure to thrive, was ill-fed or did not receive necessary medical care. The child was not abandoned or left unsupervised by his parents.

A Petition for Neglect, Dependency and For Termination of Parental Rights was filed against Petitioners on July 8, 1985. (C. 1) Shortly after the Petition was filed, the Petitioners were examined by two psychologists to test their mental abilities and presumably their suitability to be parents, (R. 82, 122) Neither psychologist examined the child, nor did either observe the Petitioners with their child. (R. 81, 124)

A hearing was held on the Petition For Neglect and Dependency and For Termination of Parental Rights on December 17, 1985. and continued and completed on January 7, 1986. Upon completion of the January 7, 1986 hearing, the trial court entered an order which was filed on January 14, 1986, adjudicating the minor to be neglected, abused and dependent, and finding the Petitioners unfit parents and terminating their parental rights. (R. 302, 303) (C. 90, 91, 94) The minor was thereupon removed from the custody of Petitioners, and placed in the custody of DCFS' guardianship administrator who was given the power to consent to the minor's adoption. (C. 94) Visitation rights have been consistently denied through the pendency of this appeal and Petitioners have not been allowed to see their child since that date. On March 26, 1986, a hearing was held on several motions for a new hearing and a final dispositional order was entered finding the Petitioners unfit parents, and terminating their parental rights. (C. 151, 152) Shortly thereafter, the Petitioners filed a notice of appeal on April 15, 1986. (C. 164)

V.

The Appellate Court order should be reviewed reversed by this Court for the following reasons:

A. *The Appellate Court's findng that the evidence supports the trial court's finding of neglect or dependency of this minor child was against the manifest weight of the evidence.*

A careful reading of the record reveals that there is no evidence of abuse or neglect of this minor child by the Petitioners. However, the Appellate Court found that these Petitioners failed to provide proper care for the minor, and cited four particular areas:

1. That Petitioners were unable to properly feed the child. Again, examination of the record reveals that, in fact, four of the state's witnesses and one of Petitioner's testified that Petitioners could, and did, feed their child.

The state's witnesses testified that Petitioners picked up the WIC vouchers every month, which entitled them to obtain food for their child; (R. 35) that the baby was gaining weight and growing; (R. 40) that just by looking at the child it was observable that he was gaining weight; (R. 112) that Petitioners were capable of feeding their child; (R. 131) that the child was eating solid foods. (R. 105)

Petitioners' witness, pediatrician Virginia Dauz, M.D., testified that the child was gaining weight within the normal range. (R. 159)

In light of the above testimony, the finding that Petitioners were unable to properly feed their child is against the manifest weight of the evidence.

2. That Petitioners were unable to properly regulate the temperature in their home. Several witnesses had testified that the apartment was kept too hot. The inference was that Petitioners were unable to properly regulate the temperature. An equally valid inference is that the Petitioners preferred a warm apartment. No one testified that any harm resulted to the child from the temperature in the apartment.

The lack of evidence of any harm resulting to the child, and as to Petitioner's preference is heating makes this finding against the manifest weight of the evidence.

3. That Petitioners were unable to recognize and appropriately respond to medical emergencies. The only testimony that specifically addressed a situation remotely resembling a "medical emergency" was the incident where the baby accidently fell out of the carrier seat. On that occasion, the child sustained no injury, as testified to by the county nurse, Joanna Cole, who examined him. Thus, there was no emergency on that occasion, and no other referred to in the record. Indeed, the other evidence in the record indicates that the child is very healthy and has rarely been sick. (R. 213)

We submit that the finding that Petitioners were unable to recognize and appropriately respond to a medical emergency was speculative and against the manifest weight of the evidence.

4. That Petitioners were unable to provide adequate emotional and physical stimulation. The only testimony directly on point in the record is from the neuropediatrician, Dr. Daniel Pochetti, who stated that, to his surprise, despite the fact that this child suffers from microcephalia, the child is not developmentally delayed or retarded at all, and that his development is within normal limits. (R. 189) Additionally, the record is filled with references to how much Petitioners love their child and care for him, (R. 159, 167, 184, 210), how they were always with him, (R. 217, 219), that they played with him and held him, (R. 201), and that when they were unsure, they asked for assistance or instruction. (R. 198-200)

All other references to Petitioner's abilities to adequately stimulate their child are future, or speculative, in nature, rather than based upon fact or factual evidence on the record. Thus, the finding that Petitioners were unable to provide adequate emotional and physical stimulation is against the manifest weight of the evidence.

B. *The Appellate Court's finding that the evidence supports the trial court's finding of abuse in this case, based on the conclusion that the minor's environment is injurious to his welfare is against the manifest weight of the evidence.*

The Appellate Court found that the evidence supported the trial court's finding of abuse to the minor child in this case based upon two particulars:

1. That the minor was dropped on a hard surface at a very young age. The incident relied upon for this finding was an accident that occurred when Petitioner was carrying his child in a carrier seat. While trying to arrange the child more comfortably, the child slipped out of the seat. The child suffered no injury, although he was examined by

both a nurse and a doctor. Surely one accidental incident does not constitute a child's "environment", or "abuse."

Any finding, based upon this isolated incident, that this child is abused or that this child's environment is injurious to his welfare is against the manifest weight of the evidence.

2. That Petitioners failed to comprehend potentially dangerous conditions is and around their home, and tend to leave dangerous items, such as medicine, within the minor's reach. This conclusion was apparently reached because of the evidence on the record that on one occasion, Petitioners unknowingly left a non-childproof medicine container on the floor, which they removed as soon as it came to their attention. Additionally, Petitioners relied on their home interventionist to learn about potentially hazardous situations and complied with her suggestions promptly when made. (R. 220, 223-224, 227, 246)

In light of all of the evidence this conclusion is against the manifest weight of the evidence.

C. *The Appellate Court's finding that the trial court had sufficient evidence to terminate parental rights not only did not meet the clear and convincing evidence standard but is also against the manifest weight of the evidence.*

The Appellate Court outlined sections b, d, g, 1, o, and p of the Illinois Adoption Act, (Ill. Rev. Stat. 1985, ch. 40, par. 1501D), in its discussion of what constitutes an unfit parent. It determined that sufficient evidence existed to support a finding of unfitness on any one of the sections indicated. However, that determination was based upon the sufficiency of evidence of abuse or neglect, which we have already demonstrated is against the manifest weight of the evidence.

The Court then indicated that the finding of unfitness pursuant to subsection (p) of the Act is the most conclusive and indisputable. That section defines unfitness as "inabil-

ity to discharge parental responsibilities supported by competent evidence from a psychiatrist or clinical psychologist of mental impairment, mental illness, or mental retardation as defined in Section 1-116 of the Mental Health and Developmental Disabilities Code, or developmental disability as defined in Section 1-106 of that Code, and there is sufficient justification to believe that such inability to discharge parental responsibilities shall extend beyond a reasonable time period."

The Appellate Court agrees that such a finding shall be by clear and convincing evidence. The evidence that it believes to be clear and convincing includes the testimony of two psychologists that Petitioner's (sic) both suffer from severe mental impairment. Additionally, the court stated that the evidence in the case conclusively demonstrated that due to their mental impairment, Petitioners are unable to discharge their parental responsibilities. It stated again that Petitioners are unable to provide proper nutrition, despite the evidence on the record to the contrary. (R. 35, 40, 112, 131, 105, 159) Additionally, it stated again that Petitioners are unable to provide appropriate medical care despite an on-going relationship with a pediatrician, and other evidence to the contrary. (R. 159, 213)

Finally, the court pointed to the Petitioner's inability to provide "emotional and physical stimulation for the minor", as evidence of unfitness. The great weight of the evidence is to the contrary. (R. 189, 159, 167, 184, 201, 217, 219, 201, 198-200)

Since the great weight of the evidence supports the contention that Petitioners are currently able to discharge their parental responsibilities, then the Court's conclusions are only supported by the psychologists' speculative testimony as to Petitioner's (sic) future abilities to discharge their parental responsibilities. That is not sufficient under the statute.

D. *The Appellate Court's decision is based upon future speculation as to Petitioners' abilities to discharge parental responsibilities thereby conflicting with another Appellate Court decision; the application of the instant statute, a case of first impression, creates a constitutionally impermissible classification. Helvey v. Rednour, 4, Ill. Dec. 671, 408 N.E. 2d 17 (1980).*

Since the manifest weight of the evidence is against any conclusion of neglect, abuse, dependency or present inability to discharge parental responsibilities, the decision of parental unfitness rests upon future speculation and the fact that Petitioner's (sic) are developmentally disabled. *In The Interest of Brooks*, 63 Ill. App. 3rd 328, 379 N. E. 2d 872 (1978), stands for the proposition that a finding of unfitness requires a finding of an actual past act of abuse, and bars speculation about the future care of the child, unless such act or pattern of acts are firmly in evidence. *See, also, In Re Stilley*, 66 Ill. 2d, 515, 363, N.E. 2d 820 (1977). Examples of past acts or patterns of abuse or neglect include the following clear findings as to some parents' inability to discharge parental responsibilities:

a. Feeding the child soda pop and chocolate milk, and failure to dispose of dirty diapers and sanitary napkins, *In Re Devine*, 81 Ill. App. 3d 314, 401 N.E. 2d 616 (fifth dist. 1981), and the parents failed to learn to prepare the infant's formula, the baby was dirty and roaches were found in the food.

b. *In Re Edmonds*, 85 Ill. App. 3d 228, 406 N.E. 2d 231 (third dist., 1980) involved a mentally retarded mother whose failure to remove the child from the crib resulted in an infant with poor motor abilities and at 32 months was unable to walk.

c. In, *In Re Hill*, 102 Ill. App. 3d 387, 430 N.E. 2d 75 (First Dist., 1981), the apartment had no gas or hot water, no refrigerator, food or stove. The home had no beds and the condition of the child was described as weak and dull-

eyed.

d. In *Devine* and *Edmonds* the parents rejected any efforts to teach home making or child rearing skills.

e. Mental retardation alone is not in and of itself sufficient for a finding of unfitness. *Helvey* (supra).

f. Abandonment of the child *In the Interest of Gates*, 57 Ill. App. 3d 844, 373 N.E. 2d 568 (Fifth Dist. 1978).

g. Failure to provide specific care to a handicapped child, together with abandonment, *In Re Grant*, 29 Ill. App. 3d 731, (First Dist., 1978).

h. Failure to protect a child from physical abuse, *In Re Brown*, 86 Ill. 2d 147, 427 N.E. 2d 84 (1981), *Dalton*, (supra).

These have provided a basis in fact for termination of parental rights, when proven by clear and convincing evidence i.e., proof that leaves no reasonable doubt concerning the truth of the matter at issue, a standard of evidence more conclusive than a mere preponderance of evidence. *In Re Drescher*, 47, Ill. Dec. at 636, *In Re Stephenson*, 68 Ill.2d 544 (1977). *In Re Hobeck*, 95 Ill. App. 3d 169, 419 N.E. 2d 713, (Fourth Dist. 1981), required the State to prove by clear and convincing evidence of one or more statutory grounds, the unfitness of the parents.

In determining fitness the court must look to the conduct of the parents during the entire period of time in question and not simply scrutinize any single isolated period, *Adams v. Adams*, 58 Ill. Dec. at 716. In *Paul v. Steele*, 101 Ill. 2d. 345, this Court stated,

> "A judgment that a person is unfit to rear his or (sic) own child is one of the most devastating of judicial decisions. A fundamental right is involved; parents have rights superior to others, including the State, in the rearing of their child unless it is shown by clear and convincing evidence they have forfeited one of mankind's most important rights."

In the absence of any clear and convincing evidence of past acts or patterns of abuse or neglect, and in the absence of any evidence that these Petitioners are currently unable to discharge parental responsibilities, the speculative testimony of the psychologists' about Petitioners' future ability to discharge parental responsibilities barred by *Brooks*, (supra), and *Stilley*, (supra), the Court's decision rests solely on the fact that these Petitioner's are mentally retarded.

A decision based upon such a classification requires strict scrutiny by this Court. *Meyer* v. *Nebraska*, 262 US 390, 43 S. Ct. 625, 67 Led 1042 (1923). Such a scrutiny reveals the same problems discussed in *Helvey*, (supra) where this Court decided that the right of a retarded couple to raise a family was constitutionally protected, and that a finding of continued mental retardation in the future was insufficient to prove the unfitness of the parent in the present. In the absence of past or present patterns or acts of abuse or neglect, the speculation as to future abilities under subsection (p) of the act does not pass constitutional muster. Such a strict scrutiny would reveal no compelling state interest for the classification in the absence of any neglect, abuse or injury to this child.

This Court must exercise its supervisory authority and require the Appellate Court to comply with *Meyer* v. *Nebraska* and with its decision in *Helvey*. Failure to comply with these cases violates the constitutional rights of these Petitioners. The Appellate Court must be required to find, by clear and convincing evidence, either past acts or patterns of abuse or neglect or present inability to discharge parental responsibilities prior to taking children away from their parents. As a result of the action of the Appellate Court, a constitutionally impermissible classification was established which raises a question of equal protection under the Constitution of the United States and of this state for the first time.

E. *The Appellate Court's finding that there is sufficient justification to believe that Petitioner's (sic) "inability to discharge parental responsibilities will extend beyond a reasonable time," is not supported by clear and convincing evidence and is against the manifest weight of the evidence.*

The Appellate Court's first reason for the above finding is that it is undisputed that the Petitioner's mental retardation will not be alleviated in the foreseeable future. This Court already stated in *Helvey*, (supra), that mental retardation alone is insufficient for a finding of unfitness, thus, it is axiomatic that future unfitness cannot be based on the fact of mental retardation alone. Such a finding also violates the *Helvey* decision.

The next reason the Appellate Court cites for its finding that Petitioner's inability to discharge parental responsibilities will exend beyond a reasonable time is the fact that the child is at high risk for developmental delay and retardation, and these conditions are likely to manifest themselves in the future, thereby increasing the amount of care the minor will need. It reached this conclusion despite direct testimony by neuropediatrician Dr. Daniel Pochetti's testimony that despite the fact that this child suffers from microcephalia, the child is not currently developmentally delayed or retarded at all. His development is within normal limits. (R.189) Any speculation as to the future needs of this child is just that, speculation. Such speculation is insufficient for either statutory or constitutional reasons, *see Helvey* and Ill. Rev. Stat. 1985, ch. 40, par. 1501D (p).

The Appellate Court then concludes that the Petitioner's parenting skills will remain static, despite overwhelming evidence to the contrary. (R. 220, 223-224, 227, 246, 198-200, 106-107, 114, 127-134, 35) Indeed, there is testimony by both the court's psychologists, Drs. Matthews and Gillespie and the county nurse, Joanna Cole, that there are head start programs available for early intervention in the area (R. 84, 127-134, 198-200), which Petitio-

ners already use and cooperate with.

Based upon the speculative nature of the Appellate Court's decision on this point as well as the above-described testimony, we believe that this part of the Appellate Court's decision was against the great weight of the evidence.

F. *There is a need for the Supreme Court to exercise its supervisory authority because of the general importance of the question presented. There is a serious public policy issue when obedience to one law results in punishment by another law.*

These Petitioners, as guardians of their child, have a responsibility to obtain services necessary to their child's development, Ill. Rev. Stat. ch. 37, par. 701-2 (3) (b), wherein it states "every child has a right to services necessary to his proper development, including health, education and social services." These Petitioners insured that their child received necessary services, thereby demonstrating their ability to exercise their parental responsibilities. In part, it is the very need for these services that led to the termination of their parental rights. When they opened their home to the State, they availed themselves of services, which ultimately led to the determination by the legal system that they are unfit parents and incapable of discharging their parental responsibilities. Ironically, it is the same legal system that requires them to seek out these services for their child. This results in a chilling effect on parents seeking necessary services for their children or themselves. This Court has a compelling interest in avoiding such punitive results.

G. There is a need for the exercise of the Supreme Court's authority because the dispositional order for adoption of the child was against the manifest weight of the testimony of the state's witnesses who recommended foster placement, and admitted that parenting classes for the Petitioners would be beneficial; thereby recognizing the

potential for these Petitioners to learn the necessary skills to raise their child. (R. 127-134)

H. The lower court's opinion should be reversed because the denial by the trial court of the Petitioner's motion for the appointment of an expert at the dispositional hearing deprived Petitioners of the right to present evidence that would show that the disability of being mentally retarded is not static or unchanging. The psychologists upon whose testimony the court relied claimed no expertise in working with or knowledge of the actual adaptive skills of the mentally retarded, yet the court disallowed the Petitioners the opportunity to show, through expert testimony, that mentally retarded persons are capable of learning. Indeed, the record is replete with evidence that these Petitioners did learn to better care for their child.

This presumption by the lower court that mentally retarded persons are per se unable to learn, violates the policy of this state which requires its Department of Mental Health and Developmental Disabilities to provide for the habilitation of mentally retarded persons; that is, an effort toward the alleviation of the effects of the condition, or toward increasing the level of physical, mental, social or economic functioning, (*Ill. Rev. Stat.* ch. 91½ par. 1-111), a requirement that implicitly recognizes the ability of mentally retarded persons to learn in the future and to have learned in the past.

Respectfully submitted: Dated: January 6, 1987

/s/ CAROL J. BELL ESQ.

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CERTIFICATE OF MAILING

I, Carol J. Bell, an attorney, hereby certify that on the sixth day of January, 1987, I mailed three copies each to the following persons at the addresses noted of the Petition for Leave to Appeal As a Matter of Right / Petition for Leave to Appeal to the Illinois Supreme Court filed this date with the Illinois Supreme Court, by First Class Postage Prepaid:

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